

June 13, 2018

VIA Electronic Filing (ECFS) and US Mail

Federal Communications Commission

Attn: Office of the Secretary, Commission's Secretary

445 12th Street, SW

Washington, DC 20554

**RE: CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT
ON INTERPRETATION OF THE TELEPHONE CONSUMER PROTECTION
ACT IN LIGHT OF THE D.C. CIRCUIT'S ACA INTERNATIONAL DECISION,
CG Docket No. 18-152, No. 02-278**

Dear Sir or Madam,

Rushmore Loan Management Services LLC ("Rushmore") appreciates the opportunity to comment on the interpretation of the Telephone Consumer Protection Act (TCPA) in light of the U.S. Court of Appeals for the District of Columbia's decision in *ACA International v. FCC*.

INTRODUCTION AND EXECUTIVE SUMMARY

Rushmore is a mortgage company that services a wide variety of consumer residential mortgage loans for borrowers at all ranges of the credit spectrum. Some of these consumers are past due when their loans are submitted to Rushmore for servicing. Opening the communication lines with any consumer promptly upon loan servicing transfer is critical to helping consumer avoid suffering the adverse consequences associated with delinquency. It is also often required by other regulatory requirements. This is particularly true for borrowers in default. Often, upon opening the lines of communication with a borrower, we are able to assist them with a work out solution that can help them retain their home or at a minimum limit the adverse consequences of default. Because borrowers in default often disregard written communications, telephone communication is often the only effective means of communicating with the borrower. Accordingly, telephone communication with borrowers is critical to providing them mortgage relief.

We note that the purpose of the overwhelming majority of calls placed by Rushmore is to discuss a consumer's default or other loan status for existing loans that have been assigned to Rushmore for servicing. We feel this is distinguishable from calls made by entities without an existing business relationship with a particular consumer.

Increasingly, we find that borrowers utilize only a mobile phone. Our experience is that this is part of a shift in consumer preference away from land lines in favor of mobile devices. Often a consumer's mobile phone number is the only number that the servicer has or the only number the borrower answers. If we are unable or inhibited from using the borrower's mobile number, and have no meaningful, alternative way to reach them to communicate with them regarding their account.

The TCPA, as interpreted by recent Federal Communications Commission rulings and certain courts, increasingly creates an unnecessary obstacle to important borrower communications with their loan servicer. Because of these overly broad interpretations, servicers are required to deal with very costly litigation. These overly broad interpretations and rulings also impose significant regulatory compliance burdens. Ultimately, this creates a risk to consumers of losing out on opportunities to preserve home ownership or increases the difficulty and complexity of working through payment and other loan related issues.

While we understand the Commission requested comments on limited issues, which we address below, we believe the ultimate consumer good would be served by an exclusion from a number of the provisions of the TCPA for mortgage and other loan servicers. Accordingly, we urge the Commission to reconsider the arguments for exemption made by the Mortgage Bankers Association of America (MBA) by way of their June 16, 2016, Request for Exemption.

The following are my specific comments submitted on behalf of Rushmore, regarding some of the issues for which the Commission requested comments.

DISCUSSION

Recommendation for what constitutes an “automatic telephone dialing system” under Section 227(a)(1) of the Telephone Consumer Protection Act (“TCPA”), which is defined as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹

The current definition of an automatic telephone dialing system (“ATDS”) and application of the TCPA by the Commission unduly restricts and prohibits Rushmore's business objectives of servicing mortgage loans and helping borrowers stay in their homes. As the Commission noted itself in 2015, Congress enacted the TCPA “to address certain [calling practices] thought to be an invasion of consumer privacy and risk to public safety,” but since then the Commission has expanded the TCPA and the ATDS definition beyond Congress's original intent resulting in unintended consequences such as obstacles to mortgage servicing and increased litigation. Furthermore, by defining an ATDS as a telephone system that has the “capacity to store numbers,” the FCC has expanded the ATDS definition to most, if not all, modern telephone dialing systems, including personal cell-phones. Therefore, Rushmore agrees with the Mortgage Bankers Association and fifteen other trade association's May 2018 petition to the FCC on the

¹ See 47 U.S.C. § 227(a)(1); 47 CFR § 64.1200(a)(1). The term “autodialer,” is also defined as synonymous with automatic telephone dialing system under the FCC's implementing rules. See 47 CFR § 64.1200(f)(2).

Commission's definition of an ATDS. The MBA's proposed definition of an ATDS would better align with the Commission's original intent to protect consumers from unwanted telephonic solicitations and further allow mortgage servicers to accomplish their necessary and legitimate business goals, specifically working with borrowers to stay in their homes by eliminating unintended compliance obstacles and litigation costs. In our view, the primary beneficiaries of the litigation are the attorneys who earn fees for bringing and defending these claims, not the borrowers who often suffer due to the burden this litigation places on the mortgage servicing process.

Counter to Congress's original stated intent, mortgage servicer calls to benefit borrowers are now sometimes considered violations of consumer privacy due to the Commission's application of the TCPA and ATDS definition. As previously indicated by the MBA in its June 16, 2016, petition to the Commission, mortgage servicers are required by state, federal, and other agencies to make contact, specifically via out-bound telephone calls, with their consumers. The current interpretation of the TCPA places a heavy undue burden on mortgage servicers to fulfill these regulatory requirements. Regulations require mortgage servicers to contact borrowers about a number of homeowner related issues such as insurance, the effect of natural disasters on the home, and to assist the borrower in loss mitigation activities when a loan becomes delinquent. All of these calls directly benefit the borrower by providing helpful information about the status of their loan or by providing information about programs and resources available to the borrower. Besides regulatory requirements for this information to be communicated telephonically, Rushmore and other servicers have found real-time telephone contact often more effective. Due to the regulatory required and the contractual obligation of these calls, it is difficult to understand why these calls can be considered invasions of privacy and fall under TCPA purview and further limit mortgage servicer effectiveness by placing ATDS restrictions on servicers.

Another obstacle to any business's compliance with the TCPA is the rapid extinction of the landline telephone. A 2017 study conducted by the Center for Disease Control on behalf of the U.S. Government found that 50.8 percent of homes had only cellphone service.² The percentage of consumers only using cellular phones has doubled in less than a decade.³ Further indicating, and even dictating, the increased prevalence of consumers only using cellular phones, twenty state legislatures have authorized AT&T (a leading telecommunications corporation) to discontinue landline telephone service in their state.⁴ It is not only becoming common place for consumers to only use cellular phones, but it is increasingly becoming their only option. As it becomes consumers preferred, and only, option for telephone communication, Rushmore, and other business, increase added compliance costs and risk associated with legislation with different intentions drafted in a different time before the prevalence of cell-phones.

² Ap. "Milestone for Cellphones vs. Landline Phones." *CBS News*, CBS Interactive, 4 May 2017, www.cbsnews.com/news/milestone-for-cellphones-vs-landline-phones/

³ Bowsher, Karla. "Most Americans Now Part of 'Cellphone-Only' Households." *Money Talks News*, 7 Feb. 2017, www.moneytalksnews.com/most-americans-now-part-cellphone-only-households/.

⁴ Channick, Robert. "AT&T Ready to Hang up on Traditional Landline Phone Service in Illinois." *Chicagotribune.com*, 8 May 2017, www.chicagotribune.com/business/ct-att-landline-phone-service-0507-biz-20170503-story.html.

As the Commission noted, Congress enacted the TCPA to protect consumers, but also increase public safety; however, by expanding the definition of ATDS and TCPA applicability to mortgage servicer activities, the Commission has unintentionally created public harm by restricting the ability of mortgage servicers to communicate with borrowers attempting to avoid foreclosure and grave financial consequences. Part of protecting consumers includes timely communication, but the current ATDS definition prevents timely communication resulting in potential consumer harm. If Rushmore is unable to contact a consumer, then there is increased likelihood of a delinquency resulting in a foreclosure. As previously detailed by the MBA and other organizations, several financial studies argue foreclosures affect not only the individual home owner, but also the neighboring home owners and the local government through loss of home value and additional expenses.⁵

Under the current definition of an ATDS, specifically the inclusion of “capacity” to make calls to numbers generated or stored within the system, most, if not all, modern telephone systems, including personal cell-phones, can be viewed to fall under the definition of an ATDS. Due to this expansive definition, Rushmore and other mortgage servicers must expend considerable resources and time ensuring TCPA compliance and defending against ATDS related litigation. The resources expended on compliance defending, often frivolous, TCPA litigation limits the resources Rushmore and other servicers can expend to assist consumers. Due to the expansive definition of ATDS including most modern phones, TCPA litigation has become a cottage industry for plaintiff’s attorneys. In 2016 alone, there were nearly 5,000 TCPA law suits filed by private litigants.⁶ This number remained relatively unchanged in 2017 with 4392 private TCPA litigants.⁷ Since 2012, the number of TCPA private litigants has increased fourfold. These numbers are irrespective of FCC enforcement actions, so it speaks nothing to the merits of these actions. The mortgage servicing industry as a whole has increasingly found that these suits lack merit and borrowers do not receive as much benefit to these law suits as the attorneys recouping attorneys’ fees.

Additionally, mortgage servicer compliance with ATDS requirements results in a loss of employee effectiveness by limiting a mortgage servicer’s ability to fully utilize time and resource saving modern technology. Modern telephonic systems include features that improve call quality, connection, and other features, including cost savings for businesses that cannot be implemented because the ATDS definition prohibits modern telephone systems. It is counter-intuitive that the Commission intended for all modern telephones and telephone systems to be considered ATDS system, but the current definition has resulted in mortgage servicers, and other businesses, expending resources complying and litigating with regulations not intended for their business activities.

Rushmore agrees with the MBA’s petition for the Commission to revise its definition of an ATDS. By adopting the MBA’s proposed definition of an ATDS, the Commission would ease

⁵ See, Petition for Exemption Counsel for Mortgage Bankers Association *In ReMatter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (June 16, 2016).

⁶ “2016 Year in Review: FDCPA Down, FCRA & TCPA Up.” *Webrecon*, webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/.

⁷ “WebRecon Stats for Dec 2017 & Year in Review.” *Webrecon*, webrecon.com/webrecon-stats-for-dec-2017-year-in-review/.

the compliance and litigation costs on mortgage servicers allowing them to better serve and more effectively communicate using modern technology with their consumers. As previously stated here, and as argued by the MBA and other trade organizations, most modern telephone technology has the “capacity” to be an ATDS. By altering the definition to exclude those calls made with human intervention would allow mortgage servicers to conduct their business without expending resources and time on ATDS compliance and related law suits. Rushmore and other mortgage servicers already utilize employees, who must “intervene” with the ATDS system to contact consumers. Additionally, this revision would not have an adverse consequence to the TCPA’s intended goal of protecting consumer privacy.

Recommendation on how a called party may revoke prior express consent to receive robocalls

Rushmore’s business objectives and regulatory requirements are inextricably linked to its ability to contact consumers. The Commission’s inclusion of mortgage servicing calls in the category of “robocalls” and allowing near unlimited consumer opt-out/revocation of consent has obstructed Rushmore, and other mortgage servicers, from conducting their business resulting in unintended consumer harm. If the Commission allows mortgage servicers to limit the means of consumer revocation, then mortgage servicers would still be able to effectively communicate beneficial consumer information and consumers would be able to revoke their consent to non-regulatory required calls.

As detailed above, mortgage servicers are required by state, federal, and other agencies to contact consumers telephonically in order to aid the consumer in loss mitigation efforts. If a consumer is able to withdraw their consent to telephonic contact without limitation, then not only are Rushmore’s business efforts harmed, but also Rushmore’s means as to complying with federal regulation is hampered and the consumer may be blocking themselves from consumer protection information and services. Additionally, due to the nature of mortgage servicing, consumers are often in difficult times and do not wish to speak with their mortgage servicer despite the mortgage servicer’s intention of providing home-saving and borrower beneficial information and services. This often results in consumers attempting to revoke consent or prevent the mortgage servicer from calling again. As stated above, as consumers increasingly use cellular phones as their only communication device, if mortgage servicers allow for consumers to revoke cellular phone consent, then the servicer risks losing any ability to contact the consumer about consumer benefits and protections.

Rushmore, as would other mortgage servicers, petition the Commission to allow limited means of revoking prior express consent that is similar to the process prescribed by the Federal Debt Collection Practices Act, which allows consumers a process to instruct their servicer to cease communication. There are obviously limitations under the FDCPA, for example, the FDCPA does not include a cessation of regulatory required statements and information. Rushmore recommends that the Commission adopt a similar revocation standard for the TCPA. If the Commission were to limit consumers to only revoking consent to non-regulatory required calls and not allowing consumers to revoke telephonic consent to the only number listed on an account, then Rushmore’s business objectives would not be obstructed and consumers could not block themselves from receiving regulatory and beneficial consumer protection information.

Only allowing for consent to be revoked via a written document would ensure that consumers do not unintentionally limit their access to beneficial borrower information. Additionally, by only allowing consumers to revoke consent to non-regulatory calls would better align the TCPA and FDCPA, but also further protect consumers. Furthermore, this approach, which is proven to work in the context of the FDCPA, would avoid a mortgage servicer from discontinuing communication as a result of an error, for example misunderstanding a comment made by a borrower during a phone call.

A combination of exempting telephone calls made through an ATDS with human intervention from TCPA restrictions and limiting the methods of revocation would allow mortgage servicers to more effectively communicate with borrowers and accomplish their business, contractual, and regulatory goals of protecting consumers.

Thank you again for the opportunity to share our views with you on this important matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Terry L. Smith", with a stylized flourish at the end.

Terry L. Smith
Chief Executive Officer
Rushmore Loan Management LLC